Supreme Court, U.S.
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No. 01-1576

In The
Supreme Court of the United States

PEGGY FARRIOR,

Petitioner,

v.

WATERFORD BOARD OF EDUCATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

JOSEPH GARRISON
JEFFREY S. BAGNELL
GARRISON, LEVIN-EPSTEIN, CHIMES & RICHARDSON, P.C.
405 Orange Street
New Haven, CT 06511
(203) 777-4425

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

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REPLY BRIEF FOR PETITIONER

The Question Presented in the petition is as follows:

> In reviewing the decision of a district judge to *grant* a motion for a new trial, should an appellate court utilize a greater degree of scrutiny than would be appropriate in reviewing the *denial* of such a motion?

(Petition, i (Emphasis in original)). Respondent urges, as respondents invariably do, that the courts of appeals are in agreement regarding the question presented. Conspicuously absent from the brief in opposition in this case, however, is any account of *what* that agreement is. Do all circuits agree that greater scrutiny should be applied to orders granting new trials? Do all circuits agree that the standard of review should be the same regardless of whether a new trial was granted or denied? Respondent simply – and tellingly – does not say.

This omission is not some oversight; it lies at the core of the response. The brief in opposition pointedly declines to address whether the Court should grant review of the Question Presented actually set forth in the petition; instead, respondent frames an entirely different question, and addresses only whether its alternative question should be reviewed. The substitute question proposed and discussed by respondent is:

> [W]hether appellate courts should apply a de novo rather than an "abuse of discretion" standard when reviewing a district court's decision granting a new trial.

(Br. Opp. 1).

Respondent's recast question is deliberately worded to obscure the very real conflict among the circuits. Every circuit, respondent argues, has used the phrase "abuse of discretion" to refer to the circumstances in which the award of a new trial will be overturned. (Br. Opp. 5-8). But that does not mean that all circuits are utilizing a single, common standard. To the contrary, at the very end of the brief in opposition respondent makes the fatal concession that in practice the phrase "abuse of discretion" can and often does have very different (and thus conflicting) meanings.

> [T]he words [abuse of discretion] describe a range of standards . . . in which the amount of deference given the trial judge's rulings varies. . . . "

(Br. Opp. 9, *quoting Roland Machinery Co. v. Dresser Industries*, 749 F. 2d 380, 390 (7th Cir. 1984)).

> "Abuse of discretion" may have different meanings in different contexts.

(Br. Opp. 8, *quoting Gasperini v. Center for Humanities, Inc.*, 149 F. 3d 137, 141 (2d Cir. 1998)).

Those differences in meaning are precisely the problem presented by this case. In the Second, Fourth and Seventh Circuits appellate courts will give great deference to the decision of a trial judge to order a new trial. In the First, Third, and District of Columbia Circuits the decision of the trial judge granting a new trial is accorded only limited deference, unlike a decision denying a new trial motion. And in the Fifth, Sixth, Eighth and Eleventh Circuits an appellate court in circumstances such as this will make its own determination of whether a new trial was warranted, according no apparent weight at all to the views of the trial judge. In any of these circuits one can

find decisions using the phrase "abuse of discretion", but the actual standards of appellate review could not be more different from one another. Circuits following the close scrutiny rule have made clear that their occasional use of the phrase "abuse of discretion" does not authorize substantial (or perhaps any) deference to the conclusion of the trial judge. "[T]he label 'abuse of discretion' belies the standard of review that we actually apply to grants of motions for a new trial." *United States v. Cox*, 995 F. 2d 1041, 1044 (11th Cir. 1993).

The differences among these standards is of palpable practical importance. As we noted in the petition, circuits applying a deferential standard almost invariably affirm orders awarding new trials, while circuits applying a more stringent level of review reverse a majority of such orders. (Petition, pp. 12 n. 12, 17-18 n. 19, 22-23 n. 24). Decisions endorsing the close scrutiny standard are not isolated slips of the judicial pen; the petition sets forth 54 such opinions in seven different circuits.

The courts of appeals frankly recognize the important distinctions between these standards. The Second, Fourth and Seventh Circuits in reviewing awards of new trials utilize the same highly deferential standard that they utilize in reviewing denials. In seven other circuits, however, the standard of review where a new trial has been granted is decidedly more stringent than the deferential standard that is applied by all circuits to denials, but that is applied by only three circuits to awards of new trials. It is precisely that difference from the deferential standard that is being highlighted when the majority of circuits describe their standard of review as "closer", "greater", or "broader" – the degree of scrutiny is closer, greater and broader than would be applied by the Second,

Fourth, and Seventh Circuits to decisions ordering new trials. Conversely, it is precisely because of those very differences in the actual standard of review that the Fourth Circuit has rejected the Third Circuit's close scrutiny rule[1] and that the Seventh Circuit repudiates its earlier endorsement of that rule.[2]

Respondent urges that "the question raised in the petition has already been decided by the Court." (Br. Opp. 2). Again, however, respondent declines to explain *how* the Question Presented in the petition itself has assertedly been decided by this Court – whether the Court's past decisions endorse or reject the close scrutiny rule. The decisions of this Court in fact do neither; they merely use the phrase "abuse of discretion", the very vagueness of which has given rise to the longstanding inter-circuit conflict. It is precisely because this Court's past decisions have not resolved that conflict that this Court granted certiorari in *District of Columbia v. Tri County Industries, Inc.*, and should do so here.

There can be little doubt that the new trial order in this case would have been overturned in at least the Fifth, Sixth, Eighth and Eleventh Circuits. The meaning and protections accorded by the Seventh Amendment should not be permitted to vary in that manner depending on the circuit in which a jury trial is held.

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[1] *Gill v. Rollins Protective Services Co.*, 836 F. 2d 194, 196 n. 1 (4th Cir. 1987).

[2] *Medcom Holding Co. v. Baxter*, 106 F. 3d 1388, 1397 and n. 3 (7th Cir. 1997).

CONCLUSION

For the above reasons a writ of certiorari should be granted to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

JOSEPH GARRISON
JEFFREY S. BAGNELL
GARRISON, LEVIN-EPSTEIN, CHIMES
& RICHARDSON, P.C.
405 Orange Street
New Haven, CT 06511
(203) 777-4425

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*